RECENT AMERICAN DECISIONS.

Court of Appeals of Maryland.

HINKLEY, Executor of JARVIS and Others, v. WHEELWRIGHT, Administrator c. t. a. of WYETH.[1]

In equity a conveyance, whatever form it may assume, will be treated as a mortgage, whenever it appears to have been taken as a security for an existing debt, or a contemporaneous loan.

But on the other hand, parties capable of acting may make conditional contracts for sale of their property, and a vendor may make an absolute conveyance, subject to an agreement for a reconveyance, upon the repayment of the purchase-money, on or before a fixed day.

Nor does the fact that parties stand in the relation of mortgagor and mortgagee prevent their dealing with each other as vendor and purchaser of the equity of redemption, if the mortgagee does not make use of his encumbrance to influence the mortgagor to part with his property at less than its value.

The intention of the parties is, in such cases, what the courts seek to discover and enforce.

As between grantor and grantee, where it appears that a conditional sale was a mere cloak to an irredeemable mortgage, equity will let in the grantor to redeem; but it is a matter of grave doubt, whether, under such circumstances, it will afford the grantee a remedy for the debt against the grantor.

I. N. Steele and *Edward O. Hinkley*, for appellant.

Geo. Wm. Brown and *Arthur Geo. Brown*, for appellee.

The opinion of the court was delivered by

Miller, J.—The conclusion at which we have arrived upon the main point in controversy in this case, renders unnecessary a determination of other questions of importance discussed at bar.

Upon the best consideration we have been able to give to the subject, the court is of opinion that the absolute deed of the "Assabet Estate" from Nat. J. Wyeth to Leonard Jarvis, of the 17th of August 1852, cannot at the instance of the appellants be treated in equity as a mortgage by reason of any of the papers executed at the same time. Nor can we discover that it was the intention of the parties that such should be its effect and operation from any circumstances, disclosed by the record, preceding and accompanying its execution.

There is no doubt that in equity a conveyance, whatever form

[1] We are indebted for the opinion in this case to the Baltimore Law Transcript. Eds. Am. L. R.

it may assume, will be treated as a mortgage whenever it appears to have been taken as a security for an existing debt or a cotemporaneous loan, and that the inclination of the courts is, in doubtful cases, so to treat it and allow the grantor to redeem. But on the other hand, there is no principle of law or equity which forbids parties capable of acting for themselves from making conditional contracts for the sale of their property, real or personal, or which forbids a vendor to make an absolute conveyance of the property sold subject to an agreement that he shall be entitled to a reconveyance upon the repayment of the purchase-money or any other sum certain, on or before a fixed day, or to make any other stipulations by which the conveyance shall become void or remain absolute. Such contracts are not prohibited either by the letter or the policy of the law, and to deny the right to make them would, as was said by Chief Justice MARSHALL in *Conway's Executors* v. *Alexander*, 7 Cranch 237, be "to transfer to the Court of Chancery in a considerable degree the guardianship of adults as well as minors." Nor does the fact that parties stand in the relation of mortgagor and mortgagee prevent their dealing with each other as vendor and purchaser of the equity of redemption. Such transactions will not be set aside unless for manifest unfairness or inadequacy of consideration. A mortgagee may become the purchaser of the equity of redemption if he does not make use of his encumbrance to influence the mortgagor to part with his property at less than its value: 5 G. & J. 85.

The intention of the parties is, in such cases, what the courts seek to discover and enforce, and to establish this, evidence *dehors* the instrument, of the circumstances under which it was given or the object it was designed to fulfil, is admitted. "In cases of this kind," as was well said by Chancellor BLAND, in 5 G. & J. 82, "everything depends upon what shall be deemed the intention of the parties. Where there are several distinct instruments of writing they must all be taken together and the contract deduced from a fair construction of the whole; and evidence *dehors* the writings may be let in, not as a means of explaining or construing them, but to show what was the real and true character of the whole contract; and if it appears to have been intended only as a mortgage security, the right of redemption will not be allowed to be fettered by any conditions disadvantageous to the mortgagor." If, on the other hand, it is shown to be an absolute sale, it will

not be converted into a mortgage merely because of a stipulation to reconvey on the repayment of the purchase-money within a certain time.

In this case both parties to the deed are dead, and we have only the written instruments themselves and part of a correspondence preceding the execution of the deed from which to gather their intentions. Before examining these it is proper to observe that this is not a case in which the grantor is seeking to redeem, and, therefore, insisting the deed is a mortgage, but the executor and some of the residuary devisees and legatees of the grantee, are here asking the court to treat it as a mortgage in order to fix upon the grantor a personal liability for the debt secured by the mortgage, and they seek to do this for the purpose of having this debt set off against the share of the grantor in the estate of the grantee, he being himself one of the residuary legatees and devisees under the will of the latter.

As between grantor and grantee, where it appears that a conditional sale was a mere cloak to an irredeemable mortgage, equity will let in the grantor to redeem; but it is matter of grave doubt, whether under such circumstances it will afford the grantee a remedy for the debt against the grantor because no inconvenience can result to a creditor, unless the security is inadequate to the payment of the debt, for he may call on the debtor to make payment at once, or submit to a sale or foreclosure of the mortgaged premises; and even in those cases where he eventually proves a loser, he has no right to complain of a difficulty growing out of his own wrongful act in making the form of the transaction different from the reality: White & Tudor's Lead. Cases in Equity in 72 Law Lib. 433.

Let us now examine the circumstances attending this transaction, as well as the written instruments themselves, for the purpose of ascertaining whether the deed is, in this case, to be treated as a mortgage.

Jarvis gave to his nephew, Nathaniel J. Wyeth, of Cambridge, Massachusetts, a letter of credit on Peabody, of London, for £6000, and at the same time took from the firm of Wyeth, Rogers & Co., of New York, who were interested in the business of N. J. Wyeth, and of which Leonard J. Wyeth was a member, an engagement to guarantee him against loss to the extent of £3000. He also at the same time took a mortgage from N. J.

Wyeth on several parcels of property in Cambridge and Sudbury, Massachusetts, then valued by Wyeth at $130,000 or $140,000, free of prior encumbrances, as security for all sums of money now due or that may hereafter become due and owing from Wyeth to him, and especially and in the first place to indemnify and save him harmless from all liability by reason of this letter of credit. Amongst the property conveyed by the mortgage was the Assabet estate, consisting of an ice establishment in Sudbury. Besides the liability on account of the letter of credit, Wyeth was also indebted to Jarvis to the extent of some $2000 or $3000. These papers, the letter of credit, the guarantee, and the mortgage all bear date the 20th of August 1851.

Wyeth expressed a strong desire the mortgage should not be recorded at present, but said it might be recorded if Jarvis desired it. It was placed on record on the 4th of February 1852, and on the 2d of March, Wyeth writes, complaining of this and saying it would prevent him from borrowing money on the large surplus of his estate; that by a prior letter (which does not appear on the record) he had offered to Leonard J. Wyeth and Jarvis, ample security for the letter of credit, in which their interest was equal, and said if Jarvis would accept this it would release his other property. By letter of the 4th of March, Jarvis in reply says: "I have no wish to take any advantage I may have in being first on record, provided you and Leonard pay up the letter of credit, or one-half of it. I will pay the other half, you to give me satisfactory security for this half and for the note I hold of yours for about $2800 or $2900— say for about $18,000 in all, and provided such a change of security can now be made legally and securely. I don't wish to keep you away from your resources more than is consistent with my safety. Security, ample and good, I must have if any change is made. If I can accommodate you in this way I shall be happy to do it; but I fear your six months' law which you have brought to our notice will be an effectual barrier to any such change of security at this time."

The security thus offered by Wyeth was evidently the Assabet property, for on the 30th of July Wyeth again writes to Jarvis, saying: "you have employed some one to fix the value of the Assabet property. I do not know what the result of your inquiries has been;" and he then encloses to Jarvis two letters

from parties valuing the property, and states that it cost him over $27,000, and then adds: "I ask your early attention to this matter, for many are implicated in it; if you could write Leonard that you will be satisfied with this property for your security, it may relieve me at once." One of the enclosed letters from F. Tudor says he has seen the Assabet establishment, that the value of such property depends on the continued prosperity of the ice trade; that it cannot be worth less than cost; and as Wyeth says that it cost $25,000, he would think it worth that sum; the other letter says it would then rent for $2500 or $3000.

No other correspondence appears, and we know nothing of the further negotiation between the parties, which resulted in the contract evidenced by the instruments executed on the 17th of August 1852. These instruments are:

1st. An absolute deed from Wyeth and wife, conveying to Jarvis in fee the Assabet property for the consideration of $15,000.

2d. A lease from Jarvis to Wyeth of the same property for the term of three years from the 15th of October following, at the rent of $900, payable semi-annually, the lessee covenanting to pay the rent, to keep the premises insured, to deliver up possession at the end of the term, to pay taxes levied during the term, and also to pay the rents and taxes for such further time as the lessee may hold the same, and not to suffer waste, &c.

3d. An agreement or indenture, as it is called, between Wyeth and Jarvis, which recites the conveyance in fee to Jarvis of the Assabet property, one of the estates heretofore conveyed to Jarvis by the mortgage of the 20th of August 1851, and the lease thereof to Wyeth for the term of three years, and then sets forth "that said conveyance and demise are made upon the following terms and conditions," to wit:

First. If Wyeth shall perform the covenants in the lease, then Jarvis "agrees at any time within the term of three years above specified, upon payment to him of the sum of $15,000, to convey unto the said Wyeth, his heirs and assigns," the said Assabet estate, "and the said Jarvis further agrees that upon such payment to him of the sum of $15,000, or other satisfaction for that amount, either by a sale of said estate as hereinafter provided, or by a good and absolute title to the same, being vested in said Jarvis, he will release and discharge the said Assabet estate from all his

claims upon the same retained by him under the mortgage above referred to."

Second. Upon Wyeth's failure to perform the covenants of the lease, or if the $15,000 shall not be paid to Jarvis, for said estate, by Wyeth, his heirs, executors, &c., at or within said term of three years, then Jarvis shall have the right to sell the estate at public auction, and if such sale be made within six years from the date hereof, it shall be on the premises, with notice, &c., and upon any conveyance of the estate by virtue of this agreement, the said Jarvis may make and deliver to any purchaser thereof, a deed or deeds in confirmation, release, or warranty of the same in the name of Wyeth, as his attorney for that purpose by presents appointed; and out of the money arising from the sale Jarvis agrees, after retaining the sum of $15,000, with costs of sale, to render the overplus, if any, together with a true and particular account of the sale, to Wyeth, his heirs, &c. "And it is further agreed that any sale of said estate made by said Jarvis, after said period of six years, shall be a perpetual bar against all claims by said Wyeth, his heirs or assigns, without any notice being given or account rendered to him of the same."

4th. An assignment from Jarvis to Leonard J. Wyeth for the consideration of $17,315 of all his interest in the mortgage of the 20th of August 1851, and of the debt thereby secured, and the estate thereby conveyed, except the Assabet property, "as to which estate my interest in the said mortgage is to continue as security for the sum of $15,000;" and the residue of the mortgage, and the estate thereby conveyed, the said Leonard is to hold as security for the sum of $17,315, the consideration above expressed.

To this assignment is appended an agreement by Nathaniel J. Wyeth, dated the 18th of September 1852, by which he assents to and ratifies and confirms "the above assignment, and the separation and apportionment thereby made of the estate conveyed, and the debts secured by said mortgage."

5th. An agreement between Jarvis and Leonard J. Wyeth, which recites the deed in fee of the Assabet estate included in the mortgage, the assignment of the residue of the mortgage, and the estate thereby conveyed to Leonard, "excepting the said Assabet estate, in which the said Jarvis retains his interest under said mortgage to the extent of $15,000, for the better protection

of his title to the same;" and then stipulates that Leonard shall pay or discharge on or before the 1st of November following the whole amount due by Jarvis to Peabody on the letter of credit, and give his note to Jarvis at three years for $2315, to take up Nathaniel J. Wyeth's note to him for that amount, and Jarvis on his part agrees to supply to Leonard, on or before the 15th of October following, the sum of $15,000, "being the amount of the consideration expressed in the deed" to him for the Assabet estate, and made payable to said Leonard by the written authority and request of the said Nathaniel to said Jarvis hereto annexed.

The annexed authority here referred to is an order by which Nathaniel J. Wyeth, in consideration of the promise and undertaking of the said Leonard expressed in said agreement, directs Jarvis to pay to Leonard, on or before the 15th day of October next, the sum of $15,000, "being the amount of consideration expressed in my deed of this date to said Jarvis of the Assabet estate in Sudbury."

Subsequently to the execution of these papers, an agreement was endorsed by Jarvis on the lease, modifying it so as to extend to seven years after the 1st of January, 1855, but in all other things to remain as it is now in October 1854; and on the agreement or indenture accompanying the deed is endorsed by Jarvis of date the 13th of November 1854, this agreement: "The lease mentioned in this agreement having been by memorandum on the back of the lease extended to seven years after the 1st of January 1855, the said Leonard Jarvis agrees to extend also the right to redeem the land herein mentioned upon the payment of the sum of $15,000, at any time within said term of seven years, and not to foreclose within said term."

Looking to the face of the deed, the lease and the accompanying agreement, though the latter is badly drawn, and in some respects almost unintelligible, we think the intention of the parties is very apparent that the property was to be conveyed absolutely to Jarvis, subject to a reconveyance upon payment of $15,000, within three years, and if the property was sold after that time and within six years, Jarvis was to receive from the sale only the $15,000 with costs and expenses of the sale, but after that period of six years the deed was to remain indefeasible and absolute. No other construction can in our opinion be placed upon the last condition in the agreement that any sale made by

Jarvis of the property, after said period of six years, shall be a perpetual bar against all claims of Wyeth, his heirs and assigns, without notice given or account rendered. This is what the books call a conditional sale. The right to make such contracts being conceded, we see no limitation that can be placed on the conditions upon which the parties may choose to agree, fixing the contingency upon which the deed is to be void, or to remain absolute, and what objection can there be in so treating this transaction? The fact that the parties previously stood in the relation of mortgagor and mortgagee rather strengthens, than otherwise, the position that this was a conditional sale of the equity of redemption in this particular estate. No inequitable advantage was taken by the mortgagor of the necessities of his nephew; he did not use his encumbrance for the purpose of forcing a hard bargain out of the mortgagor, for though Wyeth speaks of being in difficulties, there is nothing to show his necessities were such or the pressure upon him so imminent as to make him willing to sacrifice his property for the sake of relief. The parties appear to have dealt at arms' length. Jarvis in the first instance took a mortgage according to Wyeth's statement upon $150,000 worth of property to secure $30,000, and also a guarantee from other parties for $15,000 of this sum. He placed his mortgage upon record. Wyeth complains of this locking up of his resources, and wants a change of security, and offers the Assabet estate. Jarvis replies he is willing to make the change provided it can be done legally and securely, but if such change is made he must have ample security.

He then sends some one to fix the value of the proffered estate. Wyeth, hearing of this, places his own estimate upon it, and gets certificates from others, of its value. Jarvis then goes to Massachusetts, for it appears he was there when the papers of the 17th of August were executed. These papers are the consummation of the negotiations and the embodiment of the final contract between the parties, and from them, it clearly appears, in our judgment, that Wyeth sold and Jarvis purchased the Assabet property, upon the terms and conditions expressed in the agreement accompanying the deed. The motive for this on the part of Wyeth, was to relieve the residue of his property from the incubus of the mortgage in the hands of Jarvis, who had manifested a determination to hold on to the whole and to place it in the hands of Leonard J. Wyeth with whom he was engaged in business, and where he

could more readily use it for business purposes, and on the part of Jarvis to permit his nephew access to his resources so far as he could do it with perfect safety to himself. We have no doubt the first proposal from Wyeth contemplated a continuance of the mortgage upon the Assabet property alone, as security for the debt, but we are well satisfied this proposal was not accepted by Jarvis. He did not trust to Wyeth's representation of its value, for if he did, we cannot see why, in view of the kindly disposition manifested in his letter of the 4th of March, he should not have consented to remain mortgagee of property worth $27,000 or $30,000 to secure $15,000 of debt or liability, and have simply released the residue of the mortgaged estates or transferred his interest in them to Leonard J. Wyeth. We cannot perceive the necessity of formally executing all these papers if the design of the parties was that the relation of mortgagor and mortgagee was thereafter to continue between them as to this property.

The reference to the mortgage, and the use of the words "security," "redeem," and "foreclose," which appear in the antecedent correspondence and in the papers themselves, are strongly relied on by the appellant's counsel as evidencing an intention of the parties that these instruments were to operate simply as a mortgage for the security of the debt. Such, it is true, are the phrases usually employed when mortgages and instruments intended as security merely are spoken of. But in these deeds and papers of the 17th of August, we find no such use of them as will warrant us in concluding such was the intention of the parties in face of the plain purport of the instruments themselves, and the express and unequivocal language used in other parts of them. The reference to the mortgage and the retention of his interest thereunder by Jarvis as to the Assabet estate, of which he was then taking an absolute deed, was made and done as one of the papers state "for the better protection of his title" to the property. The letter of Wyeth of the 2d of March had disclosed to him the fact that there were unrecorded mortgages and encumbrances prior in date to his own on this property. By releasing his mortgage and taking a deed with notice of these encumbrances they would be let in as against him and any title he might acquire under the deed. To prevent this as well as the operation of intervening encumbrances and claims against the property, Jarvis was careful to retain his interest under the mortgage to protect his

title under the deed. This, we think, satisfactorily explains the reference to the mortgage, and goes far to show the parties intended something more than the mere continuance of the mortgage by this absolute deed and the accompanying papers. The expressions in the agreement of the 13th of November 1854, extending that of August 17th 1852 for seven years, must also, we think, be taken in reference to the agreement to which they refer. When Jarvis thereby agrees to extend the right to redeem the land for seven years, we must infer he meant that Wyeth should have the privilege of repurchase on payment of the $15,000 as expressed in the agreement, and when he agrees not to foreclose within that time, he must have meant he would not proceed to sell under the agreement before that period.

If the parties had, for the first time, met on the 17th of August 1852, and these instruments had then been executed, and the fact of the pre-existing debt or liability had been shown, there would have been a much stronger case presented for treating the transaction as a mortgage, especially at the instance of the grantor. But such is not the case. The parties were perfectly cognisant of the existing relation between them of mortgagor and mortgagee, and without the use by the mortgagee of the influence of his encumbrance on the one hand, or the pressure of necessity inducing the mortgagor to part with his property for less than its value on the other, they deliberately changed their relations, and contracted for and consummated a sale and purchase of the equity of redemption in part of the mortgaged premises upon the terms and conditions expressed in these papers. We can discover no reason and can find no authority which will compel us to disturb such a transaction, certainly not at the instance of the grantee or his representatives. The parties were capable of so contracting, and the contract must in this case stand as they have made it.

We are strongly fortified in our conclusions both as to law and fact by the case of *Hicks* v. *Hicks*, 5 G. & J. 75. In that case a mortgage was given to secure an existing debt, and two years afterwards the mortgagee having also in the mean time purchased up an intervening mortgage, took from the mortgagor an absolute deed of the property, and at the same time executed an instrument in writing by which he agreed to reconvey the property to the mortgagor at the end of two years, upon the latter's paying him the sum mentioned in the deed, and in the mean time the

mortgagor was to pay to the mortgagee the sum of $125 per year.

The grantor failing to pay within the two years, filed his bill after that period to redeem, and insisted the deed should be treated as a mortgage. But both the Chancellor and the Court of Appeals decided the transaction to be a conditional sale of the equity of redemption, and refused relief. The Court of Appeals in that case said the provision in the instrument executed concurrently with the absolute deed, that the grantor was to pay the grantee $125 per year, constituted the former a tenant of the premises to the latter at a rent of that sum per annum; and that this circumstance, with others, tended to show the transaction was intended as a sale, and not as a security for the repayment of money. In this case, by an express lease, Wyeth was constituted the tenant of Jarvis, and we cannot suppose that if the instrument in *Hicks* v. *Hicks*, instead of the simple form there used, had assumed the more complex one of a lease, and an agreement containing stipulations and conditions such as are found in the present case, the decision of the Court of Appeals would have been different. Force was also given in that case to the fact that the grantor had said the property was not to pass out of his family, if he could raise the money within two years to pay for it. And this was held to be evidence that the grantor regarded the transaction as a sale, and not as a mortgage. Much stronger circumstances of that character are presented in this case. Wyeth applied for and obtained an extension of the lease and the agreement for seven years, and during his life paid the rent, showing full knowledge and consent on his part to hold the property in the sole capacity of tenant, and under the terms and stipulations of the agreement. He desired an extension of the time of the continuance of that relation, and of the power to repurchase.

Jarvis died in 1855, and Wyeth in 1856, and in the last will of the latter is this clause: "I direct my said executors to carry into effect a bond which I hold against the estate of the late Leonard Jarvis, of Baltimore, dated August 17th 1852, and extended November 13th 1854, concerning the Assabet estate, in Sudbury, if, in their judgment at the time, it will be for the interest of my estate so to do, intending hereby to leave it optional with my said executors to redeem said estate or not, as they shall deem best under all the circumstances then existing,

saving any lease I may have made of the premises." He thus, by the last act of his life, declared in effect that he had no hold upon this estate except by carrying out this bond, and that unless, when the extended time should expire, his executors should think best to redeem it, as the bond had provided, the property would not go to his devisees.

We are aware numerous authorities may be found, both English and American, in which absolute deeds have been treated as mortgages, and the right of redemption upheld. A large number of such cases have been carefully collected by the appellant's counsel in their brief, and presented in argument. Most of the cases upon the same subject will also be found collected and collated in White & Tudor's Lead. Cases in Equity in 72 Law Lib. 414 to 447.

We find nothing in those decisions in conflict with the law as announced by Chief Justice MARSHALL, in *Conway's Exec.* v. *Alexander*, 7 Cranch 218, or overruling the case of *Hicks v. Hicks*, and if any such conflict existed we should follow the decision of our own court and that of the Supreme Court of the United States. The English authorities upon the same subject will also be found to have been carefully examined and fully reviewed by Lord Chancellor COTTENHAM in the case of *Williams* v. *Owens*, 5 Mylne & Craig 303, where the law is declared to the same effect as stated by Chief Justice MARSHALL.

We have given this case an attentive and careful consideration, and are of opinion the order of the court below should be affirmed. The case, however, is one in which the executor and devisees were warranted in raising the question and in taking this appeal; and the costs of the appeal will be allowed out of the funds in the hands of the executor and trustee.

Order affirmed. Cause remanded.

The general subject covered by this decision is one of great practical interest to a large proportion of business men. It does not appear upon the face of it, to be attended with any serious difficulty; but the circumstances attending such transactions are so infinitely various, that there are very few subjects where the actual administration of the law is attended with greater embarrassment. It is, indeed, next to impossible, for counsel always to give reliable advice, as to the precise grounds upon which the particular case will be determined by the courts. It would seem there might be, and that there should be, some safe mode of escape from this uncertainty. There is really no difficulty in determining the question, whether in form and in fact a contract is a mortgage, or a

sale with the right of repurchase. The one is no more like the other in form, than a lease for life and for a term of years. But the difficulty arises mainly, we think, from the fact, that sales of real estate, with the right of repurchase, do not seem ordinarily to have any other supposable motive except as the cover for a loan, and a mode of securing its repayment. And in that view it must be regarded as a virtual mortgage. If there is a debt, and a promise of repayment of the agreed price of the land, it is in fact a mortgage—whatever it may be called, or whatever form it may assume. The principal point to which the courts should bring this branch of the law, would seem to be, that every contract of sale and repurchase must be regarded as valid, and as such be enforced, unless there is evidence, either express or resulting from the relation of the parties, or from established rules of construction, that the contract was a mere cloak for a loan, or the security of a debt; or that some unreasonable or unconscionable advantage was taken of the vendor in inducing the sale at a price very much below the actual value. The rule is well stated by WALWORTH, Chancellor, in *Robinson* v. *Cropsey*, 6 Paige 480; s. c., 2 Edw. Ch. 138. As a general rule, it is here declared, "where there is an application for a loan of money, the court, for the purpose of preventing usury and extortion, will construe an agreement for a sale and repurchase of property to be a mortgage, in case the person to whom the application for the loan is made agrees to receive back his money and interest, or a larger sum, within a specified time, and to reconvey the property, whatever form the writing may be put in, if the real object of the transaction was a loan of money." And the relative value of the property and the agreed price is there said to form an essential indication whether the contract is to be treated as a mortgage or a sale.

But the decision in this case, and the settled law of courts of equity, at the present day, may be regarded as being, that there is nothing in the relation of debtor and creditor, or of mortgagor and mortgagee, which will enable the courts of equity, as matter of law, to declare that contracts for the sale of land, with the right of repurchase for a given period, are not to be upheld between the parties, in the form in which they are made and understood. So, too, the sale of an equity of redemption by the mortgagor to his mortgagee, must be regarded as presumptively fair and obligatory between the parties. In this view of the law, and we think there can be no question in regard to its entire soundness, contracts of sale of real estate with the right of repurchase must be upheld between debtor and creditor, or even between mortgagor and mortgagee, the same as between other parties. But as ordinarily such contracts do not exist unless resorted to for the purpose of covering usury, or where the real transaction is the security of a debt, by the pledge, so to speak, of the estate, it is very justly regarded with suspicion, and slight circumstances will induce courts to treat what is in form a sale, as in fact a mortgage. There can be no question of the justice and necessity of such a rule of construction in order to protect borrowers and debtors generally from unjust pressure. There is no doubt whatever, that in the great majority of cases, any lender of money, or creditor, who obtains security upon real estate, might induce the debtor to stipulate for an absolute foreclosure of his title, upon the failure to meet the obligation promptly on the very day it fell due. And so, in fact, the contract of mortgage reads, and so it must have been upheld by the courts, but for the inequality in the position of the parties. And the same rule extends, in a degree, to many other relations, where the law regards the parties as

standing in unequal relations; as that of guardian and ward, or trustee and *cestui que trust* of any class.

And it seems to us that it is mainly upon this ground, that the courts of equity have interfered, in declaring contracts of sale of real estate with the right of repurchase to be mortgages. It is true, that if the debt is kept on foot, and the mortgagee or vendee has an election, whether to go against the land or for the debt, the substantial elements of the mortgage still exist or continue. But this class of cases will never bring any embarrassments upon the courts, unless it be in regard to the proofs. The cases of embarrassment under this head are where there is, in form, no debt; nothing but a bare sale of the land with the right of repurchase. And this must be regarded as entirely valid and binding between the parties, unless there is virtual fraud or oppression. And in the determination of this question, the important consideration will be the relative value of the land, and the agreed price. Where there is any considerable under-price paid, and the parties stood in unequal relations, the courts uniformly interfere and declare the sale a mortgage, and redeemable upon the payment of the price and interest. The purchaser, standing in the relation of creditor, or mortgagee, or guardian, or trustee of any kind, must see to it, if he desires to have the transaction upheld in a court of equity, that he pay the full value of the property. He is, indeed, by his very attitude and reference to the seller, in a position where the law will presume against him. He is bound to show fairness in the sale, instead of calling upon the seller to show unfairness, in order to avoid the sale, as he must do in all other cases. This question is discussed by the chancellor in *Holmes* v. *Grant*, 8 Paige 243, and by DENIO, V. C., in the same case, in very elaborate opinions. The subject is also examined in *Hyndman* v. *Hyndman*, 19 Vt. 9, and in a very large number of cases in the American reports, and in many English cases. *Williams* v. *Owen*, 5 My. & Cr. 303, is a leading English case.

So, also, in the execution of a power of sale by the mortgagee, although allowed to become the purchaser by the terms of the power; yet if he fails in the utmost diligence in protecting the rights of the mortgagor, the latter will be allowed to redeem: *Montagu* v. *Dawes*, 14 Allen 369. This question of the distinction between a mortgage and a conditional sale is extensively and learnedly discussed in a late case in Vermont, *Wing* v. *Cooper*, 37 Vt. 169, and the present doctrines upon the subject thoroughly and clearly presented.

It seems to be considered that a provision, that if the interest upon a mortgage falls in arrear for a given time, the whole debt shall be treated as due, is entirely valid: *Rubens* v. *Prindle*, 44 Barb. 336. But where the creditor agreed to remit a portion of his debt on the debtor giving a mortgage for the balance, with a proviso if not paid within two years the whole of the original debt should be recovered, it was held the proviso was a penalty against which equity would relieve, and allow the mortgagor to redeem upon payment of the smaller sum: *Thompson* v. *Hudson*, Law Rep. 2 Eq. 612.

The principal case seems to maintain the rule for which we contend, that all contracts of sale between mortgagor and mortgagee are to be upheld to the fullest extent, unless there is satisfactory evidence that the vendor acted under duress of circumstances. In the present case, as the application comes from the vendee, he must of course stand upon the contract, and has no ground to demand an equitable interference on his behalf. I. F. R.

Supreme Judicial Court of Vermont.

JAMES MORSE *v.* LAWRENCE BRAINERD AND OTHERS.

Where goods were delivered to one company in a connected line of transportation, dividing the freight according to their respective services, and were described in the bill of lading, as received by the company to whom delivered and to be transported throughout the line, that company was held responsible for any damage occurring upon any portion of the line, on the ground of an implied contract to deliver safely at the end of the route.

THE opinion of the court was delivered by

PIERPOINT, C. J.—This case comes into this court by appeal from a decree of the Court of Chancery, accepting the report of a Master, and determining the amount due from the defendants to the plaintiff, James Morse. The preliminary proceedings, which have resulted in bringing the case before us in its present form, we have not been furnished with the means of stating. That is probably a matter of no importance, as no questions are now made by counsel on either side except such as arise upon the Master's report.

From that it appears that the defendants were, and still are operating the Vermont Central and Vermont and Canada Railroads, as trustees, receivers, and managers, for the first mortgage bondholders, by the appointment and under the direction of the Court of Chancery; and that the business of said roads and of said trustees and receivers was and is to carry passengers and freight for hire, and that said trustees and receivers were operating said road for that purpose, under their said appointment as aforesaid.

That on the 14th of November 1859, and while the defendants were in the possession of, and operating and managing said roads as such receivers, the said Morse delivered to them, at Swanton in this state, a quantity of cattle; that the said cattle were received by one Bradford Scott, station agent at said Swanton, the agent and servant of the defendants at that place for such purposes; that the said cattle were the property of said Morse, and were shipped for, directed to, and were to be delivered at Medford, Massachusetts, and were received to be sent and forwarded to that place. The cattle were duly sent forward by the defendants; they were transported safely over the Vermont and Canada and Vermont Central Railroads, but while on the lower and

connecting roads, and on their way to Medford, the point of their destination, they were materially injured and damaged, so that on their arrival at Medford they were of much less value by reason of such injury, and in consequence thereof the said Morse sustained a serious loss—a compensation for that loss is what the said Morse is now seeking in this proceeding.

The defendants claim that they are not liable for any injury to the cattle that happened after they passed off from the roads of which they had the charge and management on to the connecting roads, and on their way to said Medford.

The principle is now well settled in this state, that railroad companies, as common carriers, may make valid contracts to carry and transport property beyond the limits of their own roads, and where they do, they are bound to deliver the property at its place of destination according to their contract, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their road on its way, and while in the charge of other carriers over whom they have no control: *Noyes* v. *Rut. and Bur. Railroad Co.*, 27 Vt. 110, and the cases there referred to.

This contract may be either express or implied.

In England the rule is, that where a railroad company as common carriers receive property destined and directed to a point beyond the termination of their own road, they are bound to deliver it at its place of destination, without a stipulation to that effect. The law imposes that obligation upon the receipt of the property, and if the company would avoid such obligation, they must do it by a stipulation limiting their liability to injuries happening upon their own road.

But in this country the rule established in most of the states is, that the company are liable for injuries that occur beyond the termination of their own road, only when they stipulate to deliver the property at a point beyond, and that is the extent to which the decisions in this state have as yet gone, and is as far as we are now disposed to go.

If, then, the defendants are to be made liable in this case, it must be upon the ground that they received the property in question under a contract, express or implied, to deliver it at Medford, its place of destination.

Whether there was such a contract or not is mainly a question

of fact, to be determined upon the master's report and the evidence referred to.

That there was no express contract for the delivery of this property at Medford is conceded.

Was there an implied contract to that effect?

From the master's report and the testimony of Lawrence Brainerd, one of the defendants, which is referred to as a part of said report, it appears that there was a business arrangement entered into between the several roads that constitute a line of communication by railroad from Ogdensburgh, in the state of New York, to Boston, Mass., for the transportation of passengers and freight; that in this chain the Vermont and Canada and the Vermont Central railroads constitute links; that under this arrangement, when a car-load of property was sent from one point upon the line to another, it went to its destination without a change of cars; the amount to be paid for carrying the property through the whole distance was agreed upon and fixed at its place of departure by the parties receiving it. This sum might be paid in gross by the consignor in advance, or by the consignee on its arrival. The freight was not to be paid to the several roads over which the property passed in its transit, but the amount which each was to receive was adjusted between themselves in their monthly settlements. This property was billed through from the place where received to the place to which it was sent, and the way-bill in this case is quite significant of what the practice was, and how the parties understood the transaction. It is as follows: "Merchandise transported by the trustees first mortgage bonds Vt. Central Railroad Co. *from Swanton, Vt., to Medford, Mass.*, Nov. 14th 1859." then is entered the No. of the car and name of its owner, name of the consignee, description of the property, receipt, rate per hundred, and the whole amount of the freight, "*payable at the station sent to.*"

When a party sends a car-load of live-stock over the roads, he is entitled to a free pass over all the intermediate roads on the train, with the car, to its place of destination. Such a pass was given to Morse. These facts, and, in short, without stopping to enumerate further, the great mass of facts and testimony reported by the master, are consistent, and many of them only consistent with the idea of an assumed liability, to transport the property in this case from Swanton to Medford.

Such, we think, must have been the understanding and expectation of Morse and the station agent at Swanton at the time the property was put on to the defendants' road at that place. It was according to the regular and established course of their business, and such an arrangement would have been within the legitimate scope of the authority of the station agent.

We think the fair and just implication from the whole case as we have it before us is, that the defendants, when they received the property of Morse, took upon themselves the obligation to transport the property safely from Swanton to Medford, and such being the case, they are liable to Morse for the injury the property sustained on its way, as reported by the master.

As there are two cases now before us between the same parties, depending upon the same principles and similar facts, the entries will be in both cases that the decree of the Chancellor accepting the report of the master and fixing the liability of the defendants, and the account thereof, is affirmed, and the cases remanded to the Court of Chancery for final disposition.

The foregoing case is interesting to the profession and to business men, as tending to define the grounds upon which the courts will imply a contract to deliver goods at their destination, the transit extending over more than one company's line. That is, at the present time, the most embarrassing problem connected with the duty of railways as common carriers. Almost all the through transportation extends over numerous successive lines, and many of them almost completely consolidated into one trunk line, and under one management. In all such cases it must be expected, of course, that the company receiving the goods and executing the bill of lading stipulating for a delivery at the end of the route, as in the present case, will be held responsible for safe delivery at that point. But where any such responsibility is expressly repudiated in the bill of lading, as is now the more common practice on these long lines of transportation, it will be impossible to hold the first company responsible for damage occurring upon the line of the other companies without practically adopting the English rule, that such is always the implied understanding. This implication obtains in the English courts, even where part of the line is by steamboat: *Wilby* v. *West Cornwall Railway*, 2 H. & N. 702. And where there is in such case an agreement between the railway company and the steamboat line to run in connection and divide the freight, both companies are held responsible for all contracts made by either: *Hayes* v. *South Wales Railway*, 9 Ir. Com. Law 474; *Webber* v. *Great Western Railway*, 3 H. & C. 771.

From the extreme difficulty of defining precisely what is sufficient ground to imply a contract by the first company to carry through, there is a constant tendency toward the adoption of the English rule, as being more easy of application, and, on the whole, not unjust in its operation with reference to connecting lines of freight transportation. Indeed in all cases, where the companies for the en-

tire line are so connected, that each company receiving goods for transportation, fixes the rate of compensation for the whole route, and it is all received and receipted for in one gross sum, there should be an implied undertaking raised for safe transportation through the entire route on the part of the company receiving the goods: *Angle* v. *Mississippi, &c., Railway*, 9 Iowa 487. But it is said here, that if the consignee knew, or might readily have learned, that there was no partnership connection between the different companies, but only one of agency, this will rebut the implication.

The rule stated in the principal case seems quite unobjectionable, that where there is a business connection between the different companies throughout the route, and the consignor has reason to believe that the company to whom he delivers the goods held themselves out as responsible for the entire route, he will be entitled to so hold them.

I. F. R.

Louisville Court of Chancery.

WILSON, PETERS & CO. *v.* SEIBERT.

A mortgage of future-acquired chattels is valid only when the property mortgaged may be regarded as a part of, or *accretion to*, property in actual or legal possession of the mortgagor at the time of making the mortgage.

A mortgage of property in which the mortgagor has no present interest, and which he must acquire, if at all, in *substitution for* or independently of any property he now has, is not valid to create any lien which equity will recognise or enforce.

THE opinion of the court was delivered by

WOOLLEY, Chancellor.—Can a mortgage upon chattels, to be acquired, and having *then* no existence, create a lien against future creditors? And, if so, in what cases will such a mortgage be sustained?

These questions have never been decided expressly by the Supreme Court of Kentucky, and that fact and their importance have made them obtain from me great attention.

The arguments of both counsel were unusually elaborate and satisfactory, and the large number of authorities to which they referred me pointed at once to the true line of inquiry.

In the case of *Morrell* v. *Noyes*, decided in Maine in 1864, and reported in 3 Am. Law Reg. N. S. 18, it was held that such a mortgage was good by a railroad corporation upon rolling-stock and machinery to be purchased in the future, and to be applied to the road itself, as an accretion to the property of the mortgagor. It will be observed that use and accretion, and not traffic

or sale, mark the property covered by the mortgage in the case referred to.

In the case of *Pennock* v. *Coe, &c.*, 23 Howard 119, the Supreme Court of the United States gave a similar decision. The counsel for the mortgagee made a vigorous attempt to induce the court to lay down the broad doctrine that there was no difference between a mortgage upon things *in esse* and things *in futuro*, and in which the mortgagor had, at the time, neither potential nor contingent interest. In support of his attempt he referred to Fonblanque, B. 1, No. 4; Powell on Mortgages 190; Coote on Mortgage Law 185; *Noel* v. *Burley*, 3 Simons 103; *Metcalfe* v. *Archbishop of York*, 1 Mylne & Cr. 553; *Langhton* v. *Horton*, 1 Hare 539; *Matter of Howe*, 1 Paige 125, 129; *White* v. *Carpenter*, 2 Paige 217, 266; *Foreman* v. *Proctor*, 9 B. Monroe 124; *Abbott* v. *Gordon*, 7 Shepley 408; *Jenkes* v. *Goffe*, 1 Rhode Island 511; *Field* v. *The Mayor of New York*, 2 Selden 179, 186; *Winston* v. *Mitchell*, 2 Story 630, and Story's Eq. Jur. §§ 1040, 1055.

I have carefully examined all of these authorities, which were either in the public or in my private library, and found that they were either foreign to the question, or were cases in which the mortgage covered future property, which was to be an accretion to the property then owned by the mortgagor, either by adding the future to the present, or by growth.

This idea of accretion runs through all the cases, which evidently contemplate that the present property is to be retained, and that the future property is not to be substituted, but merely added. Hence the Supreme Court, in the case above referred to, refused to yield to the counsel of the mortgagee, and sustained the mortgage upon the restricted ground, that the rolling-stock afterwards to be acquired was intended not to displace the old capital fund, but would be a necessary accretion to it; because without rolling stock the railroad, which was the capital fund, would be valueless.

In the case of *Mitchell* v. *Winston*, 2 Story's Rep. 630, decided by Judge STORY, the mortgage covered the machinery and tools then in possession, and machinery, tools, and stock *in futuro*. The learned judge held the mortgage good. I looked into every case to which he referred, and to which I had access, and he referred to many, and I found that all had reference to future pro-

perty, to accrue to or grow upon that which was already in existence, which was to be retained and not circulated in trade. In other words, the future property was to be an accretion, not a substitution. So far, therefore, as that case held good the mortgage upon future machinery to be added to that which was then in possession, and which it was contemplated would be retained, the decision was correct, but so far as it held that the future goods were also covered, it is not supported by previous authorities, and is disregarded in England, Maryland, Maine, and Massachusetts. It may have doubtful rest if placed upon the ground that the future stock would be the growth or product of the machinery then in use; otherwise it is singular.

But that case does not apply to this, because in that the stock would be the product of great labor and change coming from capital, skill, and machinery, and these things carry with them some idea of accretion.

But where there is the mere sale of goods unchanged in shape or quality, and the mere investment of the proceeds in the same species of goods, which are again to be sold in like manner, and so on *toties quoties*,—under such circumstances there may be profit, but surely there is neither accretion nor growth. The proper word is substitution.

In the case of *Phillips* v. *Winslow*, 18 B. Mon. 445, the mortgage was upon the railroad, and the question was whether the recital that its engines and machinery, to be afterwards acquired, should be included, created a lien. The court held that the lien attached, and lodged their reasoning expressly upon the ground that the future-acquired property was to be added to the present, and for its benefit.

And lest they might be misunderstood, the learned judges declared, "We do not deem it necessary to decide in this case whether, under ordinary circumstances, a mortgage on subsequently acquired property would be valid, or pass any title to the property." And in the next sentence they declare that their decision is governed by the particular facts of the case, "and not by the general law upon the subject."

I was informed that the question had been decided by my learned predecessor, Chancellor LOGAN, whose opinion was affirmed by the Court of Appeals in the case of *Sayre* v. *Lamdin*, No. 13,227, in this court. An examination of that case, assisted by

both counsel, has shown that no such opinion is now in the papers, and high authority has suggested to me that Chancellor LOGAN entertained different views.

It is upon these and many other similar cases, that the mortgagee rests his claim.

When we now turn to cases directly against him, and directly upon the question, the authorities are numerous, consistent, and logical.

In the case of *Holroyd* v. *Marshall*, 9 Jurist 213, decided in 1863 by a great court, and supported by the illustrious names of Lord WESTBURY, Lord WENSLEYDALE, and Lord CRANWORTH, it was held that the mortgage would not cover after-acquired property, unless it was to be an accretion by addition or growth. In *Mogg* v. *Baker*, 3 Meeson & Welsby 195, it was declared by Baron PARKE that "if it was only an agreement to mortgage furniture to be subsequently acquired, to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it should cover no specific furniture, and would confer no right in equity."

In *Morrill* v. *Noyes*, referred to above, the whole question is examined with consummate ability and decided with singular accuracy. The cases of *Edgitt* v. *Hart*, 5 Selden 216, *Davis* v. *Ransom*, 18 Illinois 401, *Collins* v. *Myers*, 16 Ohio 547, are sufficiently decisive of the illegality of the mortgage in this case.

It is laid down in Comyn's Dig., tit. *Grant*, D., "that a man cannot grant a thing which he has not." So in Bacon's Abridgment, tit. *Grant*, D., it is said, "a man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards, for there he hath it not actually or potentially." The thing sold must have an actual or potential existence. See 2 Kent 468. If the seller own the sheep he can sell the wool afterwards to grow. See also 4 Metcalf (Mass.) 306, 2 Cush. 300, and 7 Ad. & E. 850, which illustrate the question. Nothing can be stronger in the same direction than the decision of Chief Justice TINDAL in *Lunn* v. *Thornton*, 1 Man. Gr. & Scott 379, decided in 1845.

It must be conceded, as a general proposition, that a mortgage of such goods as may be in store on a future day, or of such furniture as may be in a house, when no particular property is referred to, will not convey any title to, or create any lien upon, such property subsequently acquired which can be upheld or enforced

in a suit at law. All the books declare that; and equity, according to the cases I have examined in England and America, holds the same doctrine, except when there is a thing in possession of the seller to which the other things can attach in future as a part of the thing possessed, and not in substitution for it. A man cannot give or sell that which at the time of sale is not either within his actual or potential possession. *Qui non habet, ille non dat.* The Maine Case affirms: "The vendor or mortgagor must have a present actual interest in it or concerning it."

And, according to the 14th rule of Bacon's Maxims, "the law doth not allow of grants except there be the foundation of an interest in the grantor." And in the case just referred to the court says that "there must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible existing basis for the contract."

If a merchant owning one bale of cloth should by mortgage declare that that bale, and all other bales he should hereafter acquire, should be subject to the mortgagee's claim, surely one hundred bales, bought months or years afterwards, could not be considered the product of the present bale in possession. I have yet to learn that if a liveryman sell one horse, and with the money buy another, the second is the product of the first. It has been held that if a man contracts for the construction of a carriage or ship, and even pays for it, he cannot sell or mortgage the ship or carriage; but if he buy one in process of construction he can.

After having examined the English and American cases, I was curious to see how the question was treated in the civil law, and I have looked into it.

I find the doctrine the same as in England and America. On page 649, 1 Domat, Cushing's edition, it is said, "this mortgage extends to all the things which they shall afterwards acquire, that are capable of being mortgaged, by what title soever it be that they acquire them, and even to those which are not in being when the obligation is contracted; so that the fruits which shall grow upon the lands will be comprehended in the mortgage of an estate to come." On page 650 it is said: "Although the mortgage be restrained to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or shall augment it and make a part of it. Thus the fruits which

grow upon the lands that are mortgaged are subject to the mortgage, while they continue unseparated from the ground." The great jurist proceeds to give a number of like instances, as the foals, the lambs and other produce of beasts that are mortgaged; and the accretion to mortgaged lands by the alluvion which the river may make.

All these go to illustrate the established English doctrine that a mortgage of property to be acquired *in futuro* extends only to such things as may be the product of, or the accretion to, a thing already in existence to which those to come will or may attach.

The idea of substitution is everywhere ignored.

An eminent jurist and author, Chief Justice REDFIELD, in his review of the Maine Case, in 3 American Law Register, referred to above, confesses that a mortgage of future-acquired goods, merely for the purpose of merchandise, is void both at law and equity, and he bitterly laments that courts of equity are not as progressive as merchants, otherwise such a mortgage would now be sustained.

I am not persuaded that I should share his lament. Policy and principle indicate a different course.

It is the very essence of commerce that merchandise shall be shipped the world over, without clogs, hindrance or fetters, except while in the hands of the possessor. If every bale of goods which comes to this city should, the moment it touches the wharf, be fettered with a long-made and unknown mortgage, the merchants of New York would look elsewhere for their correspondents. If every barrel of pork or hogshead of tobacco shipped to New York, at once became liable there to a previous debt of the consignee, with which the consignor had no part or acquaintance, the merchants of Louisville would look elsewhere for a market. If all the cities of the world were to adopt such a course, I doubt whether commerce would be advanced.

I am of opinion that the mortgage is invalid, and that it was made for the purpose of hindering creditors in the collection of their debts. It is fraudulent in law, and I am not sure that it is not fraudulent in morals. The attachment should be sustained.

District Court of the United States for the District of Wisconsin. In Admiralty.

THE GERMANIA INSURANCE CO. AND OTHERS *v.* THE STEAMBOAT LADY PIKE, CHRISTOPHER G. PEARCE AND OTHERS, CLAIMANTS.

A steamboat towing three loaded barges down the Mississippi river, in approaching bridge piers too closely to back or stop, the tow is driven against a pier by a sudden and unanticipated gust of wind: the carrier is not liable for loss or injury of the cargo of one of the barges.

MILLER, J.—This steamboat, at a port on the Mississippi river below St. Paul's, was contracted with to proceed up that river and up the Minnesota river to Shokopee, in the state of Minnesota, with three barges; and there to take on board the barges wheat in bulk, and to transport the same to Saranak, on the first-named river, in the state of Illinois. The wheat was put aboard the barges to be delivered in good order, *unavoidable dangers of the river* and fire only excepted. Heading down the Mississippi river, the steamboat with the three loaded barges, two on her larboard and one on her starboard side, and running between piers of the railroad bridge near St. Paul's, the larboard barge collided with a pier, and the wheat on board said barge was greatly damaged. The insurance companies having paid the loss, brought this libel.

The accident happened about three or four o'clock in the afternoon of April 24th.

Claimants allege in the answer that the steamboat and barges left Shokopee in good order, and proceeded on the trip with all possible care, caution, and skill; that when passing through the piers in the usual way, and while in the usual channel for such passage, the steamboat and barges were by a sudden gust of wind blown to the larboard, so that the larboard barge struck the pier on that side and was sunk. It is further alleged that the steamboat and barges were fully and completely manned and equipped, and in all respects river-worthy, and were carefully and skilfully managed at the time of the injury, and that the sinking and consequent loss was an unavoidable danger of the river. The charge in the libel of negligence and improper conduct is denied in the answer.

There is no doubt from the evidence that the boat and barges

were in good order for the service, fully equipped and manned, and in every respect river-worthy. There happened to be on board two captains and also two pilots at the wheel, at the time of the accident, and every man on board was then at his post of duty.

The river was high, with a current at the piers of about three miles to the hour, and nearly in line with the piers. By measurement on the ice the space between the piers was 116 feet, which probably would be increased some at a high stage of water by an inward inclination of the walls of the piers. The tow measured in breadth about 105 feet. The tow was running for the centre between the piers, and in a calm would clear them by about five and a half or six feet. Occasional gusts of wind met the tow through the day, but for an hour before reaching the piers there was a calm, and those on board had no anticipation of wind on approaching the piers. But when within the length of the boat from the piers a sudden gust of wind struck the tow and forced it against the pier and stove the barge. The boat was light, and having but a stern wheel she could not back with the three loaded barges in time to avoid the collision, but was obliged to keep on her course. The rate of speed was then about seven miles an hour. The channel seems to be divided, a portion passing between the piers, which was pursued by the tow, and a portion between the adjoining piers, which is wider, but it is said was not then taken by tows on account of a sunken barge. Other tows loaded passed in the course taken by this tow in safety; and this tow passed up safely three days before the accident, with the knowledge of the shipper. It is not settled that the current could have caused the collision with the pier. Some witnesses testify that it is unsafe to pass a tow of that breadth between those piers. And it is also testified that the piers should have been approached at a slow bell. On the other hand it is testified, by experienced river steamboat men, that the boat would be more manageable at the rate of seven miles an hour than slower. I think this latter opinion is the more satisfactory. And experience has tested the safety of passing between those piers with tows about the breadth of this one. I am well satisfied that if the piers had been approached by the tow under a high wind the boat should be condemned for unskilfulness of the officers. But there was a calm until the approach to the pier was too close to admit of avoiding the effect

of an unanticipated and sudden gust of wind. It is contended that the alleged cause of the collision was an afterthought, as it is not mentioned in the protest. The omission may possibly tend to weaken the force of the testimony on this subject; but it is not probable that such a number of witnesses, including nearly every man on board, would testify to a fabrication. I consider the alleged cause of the collision established by the proof. Libellants insured against the consequences of the collision; but did the contract of the carrier guarantee indemnity to the shipper?

The Supreme Court of the United States in *The Niagara* v. *Cordes*, 21 How. 8, lay down the position that a common carrier is responsible for every loss or damage however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. In *Clark* v. *Barnswell*, 12 How. 272: Although the injury to a portion of the cargo may have been occasioned by one of the excepted causes, yet still the owner of the vessel is responsible if the injury might have been avoided by the exercise of reasonable skill and diligence in the storage or care of the goods on the part of the persons employed in the conveyance of the goods. The *onus probandi* then becomes shifted upon the shipper to show the negligence. This case involved exclusively the duty of a master in the stowage and care of the cargo. In *Stainback* v. *Rae*, 14 How. 532, the collision being considered the result of inevitable accident, neither party was held liable; also *The Morning Light*, 2 Wallace 550. Inevitable accident must be understood to mean a collision when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident: *Steamship Co.* v. *The New York and Virginia Steamship Co.*, 24 How. 307. In *New Jersey Nav. Co.* v. *Merchants' Bank*, 6 How. 344–347–383; it appears to be the understanding that under the exception in this bill of lading it is incumbent on the carrier, in order to relieve himself from responsibility, to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. The carrier must satisfy the court by clear and conclusive testimony that there was no default on his part; and that every reasonable effort was made to avoid the accident. But he is not expected to warrant that his crew is

perfect, or that his boat or vessel is perfectly secure, or that he pursued the best course on his voyage. It is sufficient if the crew and vessel are in all respects adequate to the particular duty and service, and that the course taken was used ordinarily and proved to be safe.

I am satisfied that the defence is available to claimants within the exception in the bill of lading. A carrier is not responsible for the effects of sudden gusts of wind. This is a danger and accident of navigation over which he has no control, and against which his contract contains no warranty. Boisterous weather, adverse winds, and low tides are beyond the control of carriers on the ocean, and relieve them from responsibility for delay in the voyage, or injury to the cargo. Upon the same principle should a carrier not be answerable for goods lost by tempest or a sudden gust of wind. An act of God relieves the carrier when using due caution and skill.

In the case of *Amies* v. *Stevens*, 1 Strange's Rep. 128, the plaintiff put goods on board the defendant's hoy, who was a common carrier. Coming through a bridge by a sudden gust of wind the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time. The defendant was held not answerable, the damage being occasioned by the act of God, an extraordinary accident. In *Colt* v. *McMechan*, 6 Johns. Rep. 160, where a vessel was heading up the Hudson river against a light and variable wind, and being near shore, and while changing her course the wind suddenly failed; in consequence of which she ran aground and sunk. It was held that the sudden failure of the wind was the act of God and excused the master, there being no negligence on his part. KENT, C. J., concurred in the opinion that the sudden failure of the wind was the act of God; and an event which could not happen by the intervention of man, nor be prevented by human prudence. But he thought there was a degree of negligence imputable to the master in sailing so near the shore under a "light and variable wind," that a failure in coming about would cast him aground. "God caused the gust to blow in the one case, and in the other the wind was stayed by Him." It is well settled that when collision or loss occurs in the absence of fault on the part of the carrier, and under circumstances beyond his control from *vis major*, as from storm, or waves,